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No. 532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

STAR TELEVISION, INC.; COMMUNITY BROADCASTING, INC.; CITIZENS TELEVISION CORP.; HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.; and MAIN BROADCASTING CO., INC., *Petitioners*

v.

THE FEDERAL COMMUNICATIONS COMMISSION *and* FLOWER CITY TELEVISION CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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For the reasons set forth in their Petition for a Writ of Certiorari, petitioners in No. 532 submit that this case involves important recurring questions of federal law warranting review by this Court. Respond-

ents' briefs in opposition have failed to demonstrate that this is not true or that certiorari should not be granted. Nevertheless, there are some errors and oversights in respondents' briefs in opposition which should be pointed out.

1. Respondent Flower City Television Corporation asserts that there were no differences within the court below as to the rationality of the Commission's comparative process and that the degree of difference between the majority opinion and Judge Leventhal's dissent is not a matter calling for review by this Court (Flower City's brief, pp. 12-13). However, a reading of Judge Leventhal's dissent makes it clear that he questioned the rationality of the Commission's comparative process (App. 47a-48a). In addition, the dissenting opinion specifically indicated that the Commission had failed to follow its *Policy Statement* (*e.g.*, App. 45a). Moreover, Judge Leventhal underscored the importance of the judiciary requiring the Commission to give findings and explanations, as it "promotes confidence that decisions are unbiased and not arbitrary" (App. 48a) and insures that agencies "are selecting those licensees who will best serve the public" (App. 49a). All in all, Judge Leventhal's dissenting opinion itself demonstrates that the case presents issues which merit consideration by this Court.

2. Respondent Flower City further states that "even a clear departure from the literal word of the *Policy Statement* would not necessarily constitute a change in basic policy" (Flower City's brief, p. 14) and that petitioners would "have the Commission give the *Policy Statement* a formulistic interpretation * * *" (Flower City's brief, p. 13). The respondent completely misunderstands the thrust of the petition for

certiorari in this case. Petitioners do not seek to require the Commission to apply the *Policy Statement* in a technical or formulistic manner. Nor would petitioners object to even a significant departure from the *Policy Statement* if explained by the Commission. What petitioners do object to, however, is what the Commission did here: a major departure from and substantial disregard of the *Policy Statement* by the Commission, without explanation and with the Commission at the same time purporting to apply the *Policy Statement*. This, as discussed in the Petition for a Writ of Certiorari, represents indefensible administrative action which, unfortunately, has been typical of FCC decisions over the years. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards,* 75 Harv. L. Rev. 1055, 1064 (1962).

3. Respondent Flower City argues that one aspect of the Commission's disregard of its *Policy Statement, i.e.,* with respect to proposed programming, was not raised before the Court of Appeals (Flower City's brief, p. 12). This assertion is in error. Repeatedly in the court of appeals, petitioners challenged the Commission's treatment of the issue of proposed programming (Appellants' brief in the court of appeals, pp. 48-55, 61-68; Petition for Rehearing of Star Television, Inc., pp. 3-13). And petitioners specifically claimed that the Commission violated its own *Policy Statement* in this regard (Appellants' brief in the court of appeals, p. 53).

4. Another error in respondent Flower City's brief in opposition is the contention that inaccurate figures were given in the petition concerning the ownership percentage of Community's and Main's full-time man-

agers as the figures allegedly "include stock owned by certain less-than-fulltime stockholders" (Brief, p. 14, fn. 12). However, the respondent overlooks a subsequent change in the status of Community's owner-managers which was noted by the Commission (App. 6a), and overlooks the fact that the full-time president of Main went from a twenty-five percent to a fifty percent stockholder as a result of his wife's death (Amendment submitted to the Commission by Main on October 30, 1967).

5. Finally, the respondents advance reasons for the Commission's decision which the Commission in its opinion did not give. For example, Flower City relies on the fact that one of its owner-managers was related to other persons owning 20.83 percent of Flower City's stock (Brief, p. 14). However, the Commission did not give this as a reason for preferring Flower City because of an alleged superiority under the criterion of full-time participation by owners. Flower City also states that the Commission judged that the experience of Flower City's owner-managers was *qualitatively* better (Brief, p. 16). This too does not appear in the Commission's decision. Regardless of any rationale for the Commission's decision put forward in the briefs in opposition, the fact is, as Judge Leventhal explained below, the Commission itself failed to explain or give a rational basis for its decision. Under well-settled principles of administrative law, such a decision should not stand.

CONCLUSION

For the reasons set forth in the Petition for a Writ of Certiorari, as well as the foregoing reasons, the petition should be granted.

Respectfully submitted,

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